NO. 10620

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Oregon.

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TABLE OF CONTENTS

TABLE OF CASES

TEXT BOOKS

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STATEMENT OF THE CASE

No issue is raised as to Appellant's statement of jurisdiction. A more complete statement of the facts and issues is desirable in order to properly present the questions to be determined upon this appeal.

The collision, which gave rise to this action, occurred on July 22, 1941, just before midnight. Both cars involved were traveling upon Lake Road in Milwaukie, which is just south of the City Limits of Portland, Oregon.

This is not an intersection case. Appellant's car was traveling east on Lake Road and Appellee's car was traveling west on Lake Road.

The cars came together on Lake Road between 28th and 29th Streets. Appellant's car had just passed the intersection of 28th Street with Lake Road and Appellee's car had passed the intersection of 29th Street with Lake Road (Tr. p. 2).

In the pleadings (Tr. pp. 3 and 6) and at the trial, each party contended that he was driving upon his own half of the highway and that the other turned over onto the wrong side of the highway, causing the collision. This was, of course, the principal issue in the case since no collision could have occurred if both had kept to their own side of the highway, irrespective of speed, lookout or control.

It is not claimed that this principal issue was not fairly and properly submitted to the jury. By its verdict the jury found that Appellee was on his own side of the road and that Appellant swerved over onto his wrong side causing the collision (Tr. p. 9).

Without challenging the correctness of the jury's finding in this regard, Appellant now contends that even though he filed no written request to have the designated speed at the place of accident given to the jury that the trial court committed reversible error in not instructing on the point.

The issue thus raised presents for determination two questions of practice and procedure and two of substantive law to which we now address ourselves.

THE TRIAL COURT CORRECTLY REFUSED TO INSTRUCT ON THE DESIGNATED SPEED AT THE POINT OF ACCIDENT.

Points and Authorities

A.

Since no written request for an instruction on the designated speed was presented, Appellant cannot complain.

Rule 51, Federal Rules of Civil Procedure.

Dallas Ry. & Terminal Co. v. Sullivan (C.C.A. 5th), 108 F. (2d) 581, 584.

Puget Sound Power & L. Co. v. Public Utility Dist. No. 1 (C.C.A. 9th), 123 F. (2d) 286, 291, cert. den. 315 U. S. 814, 62 S. Ct. 798, 86 L. ed. 1212.

Franz Corporation v. Fifer (C.C.A. 9th), 295 Fed. 106, 108.

B.

An oral request made after the charge was given to instruct on the designated speed presents nothing for review.

Indemnity Ins. Co. of North America v. Moses (C.C.A. 5th), 36 F. (2d) 219.
Jasper County Lumber Co. v. McNeill (C.C.A. 5th), 76 F. (2d) 207, 209; cert. den. 295 U. S. 764, 55 S. Ct. 923, 79 L. ed. 1705.
Gilmore v. United States (C.C.A. 5th), 39 F. (2d) 897.

C.

An exception to the failure of the court to instruct upon the designated speed is not the equivalent of a proper written request followed by an adequate exception.

Ripper v. United States (C.C.A. 8th), 179 Fed. 497, cert. den. 218 U. S. 680, 31 S. Ct. 228, 54 L. ed. 1207.

D.

The Oregon Supreme Court has held that it is improper to instruct on the designated speed.

Zeek v. Bicknell, 159 Ore. 167, 78 P. (2d) 620.
Ross v. Robinson, 169 Ore. 293, 124 P. (2d) 918, 128 P. (2d) 956.

E.

Since the cars were traveling toward each other on a straight highway and the jury found that Appellee was

on his own side of the road and Appellant turned into Appellee's car, his alleged violation of the indicated speed could not be the proximate cause of the accident, in any event.

Arundel v. Turk, 16 Cal. App. (2d) 293, 60 P. (2d) 486.
Erdman v. Inman, 165 Ore. 590, 109 P. (2d) 593.

Argument

At the trial, Appellant did not submit any requested instructions (Tr. p. 8). Yet he is here complaining that the Court committed reversible error in omitting to call the jury's attention to the designated speed at the location of the accident. The court did instruct on the basic rule and expressly told the jury that if either party violated the basic rule that he would be guilty of negligence (Tr. p. 8).

Rule 51 F.R.C.P. provides:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * *"

Reference to the authorities will demonstrate that since no written requests were submitted that appellant may not now be heard to complain.

In *Dallas Ry. & Terminal Co. v. Sullivan,* 108 F. (2d)

581, plaintiff sued for damages for personal injuries and the jury returned a verdict in his favor. Defendant appealed, contending that the trial court erred in failing to define to the jury "new and independent cause." In affirming the judgment, the Circuit Court of Appeals for the Fifth Circuit said on Page 584:

> "Under Federal Rules, of practice and procedure, appellant's assignments, one and two, must be overruled. First, because one complaining of the refusal to give a charge must be prepared to show that he requested it in writing, Indemnity Insurance Co. of North America Co. v. Moses, 5 Cir., 36 F. 2d 219; Rule 51, Rules of Civil Procedure, and, appellant did not do this."

This Court recently ruled upon the question in *Puget Sound Power & Light Co. et al. v. Public Utility Dist. No. 1,* 123 F. (2d) 286, wherein the late Judge Haney said on Page 291:

> "While it might have been proper for the trial court to give a cautionary instruction, the company requested none, and it cannot now urge error in that respect."

The same rule was announced by this Court in the earlier case of *Franz Corporation v. Fifer,* 295 Fed. 106, 108.

At the conclusion of the Court's charge to the jury, the following occurred (Tr. p. 8):

> " 'Mr. Lenske: I except to that portion of the instructions relating to speed and ask the court to instruct that the designated speed at the place of the collision, under the Oregon Statute, is twenty-five miles per hour, and that if either of the parties was driving his automobile at a greater speed than twenty-five miles per hour, such fact is prima facie evidence of negligence on the part of such driver; which, however, is not conclusive and can be overcome by other evidence. That is the only exception I have.
>
> " 'The Court: Exception is granted.' "

Whether counsel's statement be considered as an exception or as an oral request to instruct, it is clear, under the authorities, that Appellant may not now contend that the trial court committed reversible error in not instructing on the point.

In *Ripper v. United States,* 179 Fed. 497, cert. den. 218 U. S. 680, 31 S. Ct. 228, 54 L. ed. 1207, defendant was convicted for violating the Oleomargarine Act. In denying a petition for rehearing, the Circuit Court of Appeals for the Eighth Circuit said at Pages 497 and 498:

> "Complaint is now made that the trial court refused to instruct the jury that in order to convict it was necessary they should find the neglect to destroy the stamps was willful, and that this matter was assigned as error, but was not considered in our former opinion. It is said in the petition for rehearing that counsel

for the accused requested such an instruction, and it was refused. The record does not disclose that any requests whatever were made of the trial court. At the conclusion of the charge counsel merely excepted to it upon a number of grounds, among which was one that the court failed to instruct that the neglect to cancel the stamps must have been willful. This exception is the sole basis for the statement that a request was made and refused. It is the settled rule that if a party desires an instruction upon the law he must ask for it. Texas & Pacific Railway v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; Isaacs v. United States, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Goldsby v. United States, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343; Backus v. Depot Co., 169 U. S. 557, 575, 18 Sup. Ct. 445, 42 L. Ed. 853; Humes v. United States, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011. A bare exception to a charge is not equivalent to a request."

In *Indemnity Ins. Co. of North America v. Moses,* 36 F. (2d) 219, the Circuit Court of Appeals for the Fifth Circuit said at Page 220:

> "If appelant, as it insists, also requested orally charges on the subject of partial or temporary disability, it still presents nothing here for review. An oral request merely to charge on an issue in a case is not sufficient basis for an assignment of error in a federal appellate court; but, in order to save a valid exception, it is essential to submit a request to charge in definite form. Southern Ry. Co. v. Shaw (C.C.A.) 86 F. 865, 871; Tennessee, etc., R. R. Co. v. Drake (C.C.A.) 276 F. 393."

In *Jasper County Lumber Co. v. McNeill,* 76 F. (2d) 207, the Circuit Court of Appeals for the Fifth Circuit said at Page 209:

"Besides a party who makes no objection to a charge as given except that it is incomplete is ordinarily in no position to assign error upon it. In fairness to the trial court, a request for a supplemental charge should be prepared and submitted in writing in advance of the court's charge to the jury, or at least in time for the judge to consider it and decide whether he will give it. The court should not arbitrarily refuse to give instructions at the conclusion of its charge which it was his plain duty in the interest of justice to give without being requested to do so; but ordinarily an oral request merely to charge generally upon some issue in the case or some question of law presents nothing to an appellate federal court for review. Holmgren v. United States, 217 U. S. 509, 524, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Western & Atlantic R. R. v. Hughes, 278 U. S. 496, 49 S. Ct. 231, 73 L. Ed. 473; Tennessee, etc., R. R. Co. v. Drake (C.C.A.) 276 F. 393; Indemnity Insurance Co. v. Moses (C.C.A.) 36 F. (2d) 219; Gilmore v. United States (C.C.A.) 39 F. (2d) 897."

In *Gilmore v. United States,* 39 F. (2d) 897, in affirming a judgment of conviction, the Circuit Court of Appeals for the Fifth Circuit said at Page 898:

"The trial court in its charge to the jury did not comment upon the law of circumstantial evidence. At the conclusion of that charge, for the first time the court was orally requested by counsel, but refused, 'to charge the jury the law of circumstantial evidence.' Error is assigned upon the refusal of that request; but we do not think it is well assigned. In the first place, the request came too late. It is the duty of counsel in fairness to the court to submit requests for instructions to the jury before the court begins its charge; but the court should not arbitrarily refuse, especially in criminal cases, to give instructions re-

quested at the conclusion of its charge which it was its plain duty in the interests of justice to give without being requested to do so.

"Besides, the orderly way is to prefer such a request in writing so that the trial court may know definitely what it is, and the appellate court may be able to inspect it with the view of ascertaining whether in its opinion the proposition of law asserted is correct and is applicable to the facts of the case.

"The refusal of a mere oral request to charge generally upon some question of law presents nothing to an appellate court for review. Holmgren v. United States, 217 U. S. 509, 524, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Greenburg v. United States (C.C.A.) 297 F. 45; 14 R.C.L. 804."

It is clear therefore that Appellant may not now contend that the trial court committed reversible error in not instructing upon the designated speed.

Assuming that Appellant properly requested an instruction on the designated speed, so that he is now entitled to contend that the trial court erred in omitting to instruct on the point (which we emphatically deny), two rules of substantive law support the trial court's action in refusing to instruct on the point.

The question whether it is proper to call the jury's attention to the designated speeds has been considered twice by the Oregon Supreme Court. In both cases it was held that the trial judge erred in mentioning the designated speed to the jury.

In *Zeek v. Bicknell,* 159 Ore. 167, 78 P. (2d) 620, the trial judge instructed the jury upon the basic rule and called their attention to the designated or indicated speed at the place where the collision occurred. The jury returned a verdict for the plaintiff and the trial judge set it aside and granted a new trial. Plaintiff thereupon appealed and the Oregon Supreme Court held that a new trial was properly ordered because the trial court erred in instructing on the indicated speed. The Oregon Supreme Court said on Page 174 (of 159 Ore.):

> "The court is not unmindful that, in *Dickson v. King,* supra, (147 Ore. 638, 34 P. (2d) 664) an order granting a new trial was sustained because the trial court failed to instruct the jury concerning indicated speed. In that decision we did not state that it was necessary that trial judges should give to juries in civil actions the indicated speeds. The decision left the matter optional, dependent upon whether the trial judge believed that he could make the meaning of the basic rule clear by reference to the indicated speeds. It assumed that the legislature thought that a 'reasonable and prudent' speed was somewhat abstract and, hence, the indicated speeds were added by way of illustration to make the basic requirements clearer in the instances to which they were applicable. *But, since in actual practice misunderstanding and confusion have arisen, we believe*

> *that it is better to omit from instructions in negligence actions all mention of the indicated speeds. Accordingly, instructions ought to define the meaning of the basic rule and omit mention of the indicated speeds."*

The recent case of *Ross v. Robinson,* 169 Ore. 293, 124 P. (2d) 418, 128 P. (2d) 956, follows *Zeek v. Bicknell.* In speaking of the trial court's instruction on the indicated speed, the Oregon Supreme Court said on Page 313 (of 169 Ore.):

> "He should not have brought into the case any mention of indicated speed."

It is true, as counsel for Appellee suggests, that the Legislature in 1941 amended the speed law so as to include a provision making any speed in excess of the designated speeds prima facie evidence of a violation of the basic rule.

However, the reason which impelled the Oregon Supreme Court in the *Zeek Case* to rule that the indicated or designated speeds should not be mentioned to the jury is still applicable.

In any event, since the trial court instructed that a violation of the basic rule by either party would constitute negligence, it cannot be seriously argued that had the designated speed been mentioned that a different result would have been reached by the jury. Obviously, therefore, the failure of the court to mention the designated speed cannot be said to have been prejudicial or reversible error.

The application of ordinary common sense to the situation discloses that Appellee's speed could have had no proximate relation to the collision, in any event.

Appellee contended, the evidence proved and the jury found that Appellant turned from his own side of the highway over onto Appellee's half of the road and into Appellee's car. Had Appellee's car been standing still, the same result would have followed. In these circumstances, it is clear that Appellee's speed, whether over or under the designated speed, was not the proximate cause of the collision and the trial court was correct in not advising the jury of the designated speed.

The identical situation was before the California District Court of Appeals in the case of *Arundel v. Turk,* 16 Cal. App. (2d) 293, 60 P. (2d) 486. In that case the plaintiff was driving south on Main Street in Ocean Park. Defendant was driving north on the same street. A collision occurred and each party charged that the other turned from his half of the highway into the other's car. A trial was had before a jury and a verdict was returned for the defendant. Plaintiff appealed contending that the trial court erred in not giving her instruction to the effect that if defendant was operating his automobile at a greater speed than permitted by the basic rule, that she would be entitled to recover. The Appellate Court affirmed the judgment on the verdict for defendant saying on Page 488 (of 60 P. (2d)):

"It is earnestly urged that, in view of the crowded condition of the traffic and the width of the street, coupled with the fact that the accident occurred in the nighttime, it was incumbent upon the court to instruct the jury as requested. We find no merit in this claim of appellant. * * * In this case, the only pertinent issue was: Upon which side of the street did the accident happen? The rejected instruction could serve only to confuse the jury and to divert their minds from a consideration of the actual cause of the accident, which the record clearly discloses was caused by one or the other of the parties turning from the proper to the wrong side of the street. *As we view the evidence, no construction thereof will admit of a conclusion that the speed of either automobile proximately or even remotely caused the accident. The proffered instruction was therefore properly refused.*"

A very similar case was recently decided by the Oregon Supreme Court. It is the case of *Erdman v. Inman,* 165 Ore. 590, 109 P. (2d) 593. In that case plaintiff was driving north on a straight highway at one o'clock in the morning. Defendant was going in the opposite direction and a collision occurred. The Oregon Supreme Court stated the contentions of the parties as follows on Page 591 (of 165 Ore.):

"Each party claims that the other was driving on the wrong side of the highway at an excessive rate of speed, without having his car under control. The vital issue was whether the plaintiff or the defendant was on the wrong side of the road, although evidence of speed was received without objection by either party."

The trial judge gave the following instruction:

> "'If you should find, for instance, that he (defendant) was going too fast at that time, was that speed the proximate cause of the collision in and of itself. Of course, if it was not, why plaintiff could not recover on that ground, you see.'"

A verdict was returned for the plaintiff and the defendant appealed contending that the court erred in giving the instruction above quoted because the defendant's speed could not have been the proximate cause of the collision. The court said:

> "Obviously, if defendant had been driving on his right side of the highway, there could have been no collision unless plaintiff drove over onto his wrong side. *Under such circumstances, the speed at which the defendant was traveling was immaterial and could not possibly have been the proximate cause of the accident.*
>
> * * * * *
>
> "The instruction in the instant case might well have been omitted but we fail to see where it misled or confused the jury. Had counsel been as specific in the lower court as here, no doubt the trial judge would have removed all doubt concerning the instruction.
>
> "Finding no error substantially effecting the rights of the appellant, it follows that the judgment is affirmed."

The doctrine of last clear chance is not involved. Appellant did not take the position that his car was on the wrong side of the road long enough for Appellee to have seen it and, having seen it, that Appellant thereafter failed to take the necessary action to avoid colliding with him.

CONCLUSION

Appellant's failure to file a proper written request for an instruction on the designated speed, as required by Rule 51, F.R.C.P., precludes him from asserting that the trial court erred in failing to so instruct.

An oral request, made after the charge was completed, for an instruction on the designated speed or an exception to the failure of the court to instruct on the designated speed, does not take the place of a proper written request, followed by an adequate exception.

In any event, since Appellant and Appellee were approaching each other on a straight road and it was contended, proved and the jury found that Appellant turned from his side of the road over onto Appellee's side and against Appellee's car, the proximate cause of the accident could not have been Appellee's speed.

Even if it be assumed that a proper request were made, the Oregon Supreme Court has held that the designated or indicated speeds should not be disclosed to the jury.

It cannot be successfully contended that the result would have been different had the designated speed been given to the jury.

Actually, the instructions of the Court were more favorable to Appellant than he deserved. The trial court instructed the jury that if either driver violated the basic rule that he would be guilty of negligence. Under the law and the facts, Appellee's speed could not have been the proximate cause of the accident.

We respectfully submit that the judgment of the trial court, entered on the verdict of the jury, must be affirmed.

Respectfully submitted,

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